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COURT OF CRIMINAL APPEALS
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NO. PD-0075-19

APPELLATE COURT CAUSE NO. 03-18-00194-CR

FILED
COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS

REYNALDO LERMA,
Petitioner

VS.

THE STATE OF TEXAS,
Respondent

STATE'S REPLY TO PETITION FOR DISCRETIONARY REVIEW

FROM THE COURT OF APPEALS FOR THE THIRD DISTRICT AT AUSTIN

ORIGINAL APPEAL FROM THE 22ND JUDICIAL DISTRICT COURT, HAYS COUNTY, TEXAS, TRIAL COURT CAUSE NO. CR-15-0598

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Respondent does not request oral argument.

NAMES OF PARTIES

Respondent (Appellant below):	State of Texas
Attorney for the State at trial and on appeal:	Wesley Mau, Hays County Criminal District Attorney 712 South Stagecoach Trail, Suite 2057 San Marcos, Texas 78666 State Bar No. 00784539
Petitioner (Appellee below):	Reynaldo Lerma
Petitioner's Attorney at trial and on appeal:	Josh Erwin and Amanda Erwin The Erwin Law Firm, L.L.P. 109 East Hopkins, Suite 200 San Marcos, Texas 78666
Trail Court:	The Hon. Jack Robison 207th Judicial District

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW the State of Texas, by and through her Hays County Criminal District Attorney, Wesley H. Mau, and files this Reply to Appellee/Petitioner's Brief on Petition for Discretionary Review[1] pursuant to Tex. R. App. Proc. 68.9 and would show the Court the following:

STATEMENT OF THE CASE

The trial court granted Petitioner's motion to dismiss the capital murder charges against him pursuant to Texas Rule of Evidence 508 ("Rule 508"), after the prosecution failed to disclose a confidential informant's identity.[2] The State appealed from that order. The Third Court of Appeals reversed, concluding that Petitioner had failed to meet his burden of showing that a reasonable probability exists that the informer could give testimony necessary to a fair determination of his guilt or innocence.[3]

STATEMENT REGARDING ORAL ARGUMENT

Appellant has requested oral argument in this case. The facts and legal arguments are adequately presented in the briefs and record, and the decisional process

[1] Referenced hereafter as "Pet. Brief."
[2] *State v. Lerma,* 03-18-00194-CR, 2018 WL 5289452, at *1 (Tex. App.—Austin Oct. 25, 2018)(hereafter, "*Lerma*").
[3] *Id.*

would not be significantly aided by oral argument.[4] Should the Court desire the parties to appear and argue, the State will do so.[5]

ISSUES PRESENTED

Issue 1: To preserve for appeal the trial court's erroneous dismissal of an indictment under Rule 508, must the State object to the dismissal, and if so, is it sufficient if the State objected to the trial court's initial order to disclose without making the proper Rule 508 findings, then objected to the trial court's findings after the transcripts of an *in camera* review were provided, then objected to the findings again prior to the order of dismissal, and then notified the court of the State's intent to appeal the dismissal order?

Issue 2: If the trial court has no evidence demonstrating "a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence," may the court nevertheless find such probability exists if the court does not believe testimony that the informer's identity is unknown?

STATEMENT OF FACTS

During an attempted home invasion robbery by Petitioner and several co-defendants, the victim was killed—and two of Petitioner's co-defendants were

[4] *See* Tex. R. App. P. 39.1.
[5] *See* Tex. R. App. P. 39.7.

wounded—by the victim's roommate, who fired at them as the robbers forced the victim at gunpoint into the home.[6] Petitioner was indicted for capital murder in connection with the victim's death during this alleged robbery attempt.[7]

The State provided Petitioner discovery that "a confidential informant (CI) working with the Hays County Narcotics Task Force [NTF] made a controlled buy of marihuana from [the victim] about three months prior" to the capital murder.[8] Although no evidence had been offered to show any connection between the confidential informant ("CI") and the victim's shooting and no Rule 508 hearing had been held, the trial court ordered the informant's file disclosed to Petitioner.[9]

The State applied for a writ of mandamus to require the court to conduct a Rule 508 hearing before ordering disclosure.[10] The trial court finally agreed to hold the hearing prior to the mandamus proceedings' conclusion.[11]

At the *in camera* hearing, "no witness testified that he was aware of any evidence to support the theory [proposed by Petitioner], and two of the witnesses explicitly denied being aware of any such evidence. In addition, the record…does not contain any additional evidence supporting the hypothetical link between the CI and

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[6] 2 RR 10. (References to the Reporter's Record will be abbreviated in the format "[Volume Number] R.R. [Page Number]".)
[7] *Lerma*, **1-7
[8] *Lerma*, at *1.
[9] *Id.,* at *2.
[10] *Id*.
[11] *Id*.

the capital murder."[12] The officers also testified that the informant's identity had not been properly documented in their files, and they could not recall his name.[13]

The trial court made a finding that the CI could offer material testimony based on solely on Petitioner's hypothetical in which the CI might support a theory that the victim's roommate shot him intentionally (due to suspecting the victim might himself have turned informant).[14] Several hearings followed, during which the State urged the court to find that a Rule 508 dismissal was not justified.[15] But the trial court ultimately dismissed the case because informant's identity was not disclosed.[16] On the same day, the State filed its Notice of Appeal pursuant to Code of Criminal Procedure art. 44.01 ("art. 44.01").[17]

On October 28, 2018, the Third Court of Appeals reversed the trial court's dismissal, holding that the district court abused its discretion in granting Petitioner's motion to dismiss.[18] Petitioner filed a motion for rehearing on November 5, 2018, which was denied on December 18, 2018. Petitioner's petition for discretionary review was filed with this court on January 17, 2019, and granted on December 11, 2019.

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[12] *Id*., at *9.
[13] *Id*., at *3.
[14] *Id.,* at *1, *8
[15] The nature and timing of the State's objections will be set out in more detail below.
[16] C.R. 81 (References to the Clerk's Record will be abbreviated in the format "C.R. [Page Number]," or "CR Supp. [Page Number]" for the First Supplemental Clerk's Record.)
[17] C.R. 82.
[18] *Id.* at *9.

Petitioner's brief was timely filed on January 9, 2020. This reply is therefore timely if filed on or before Monday, February 10, 2020.[19]

ARGUMENT

Rule 508(a) creates a privilege for law enforcement to refuse to disclose the identity of an informant who has provided information that assists in an investigation. The rule creates an exception in criminal cases where "the court finds a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence."[20]

"The defendant has the threshold burden to show that the informant's identity must be disclosed."[21] Meeting this burden requires the defendant to make a plausible evidentiary showing of how the informant's testimony would significantly aid the defense—mere conjecture or speculation about possible relevancy are insufficient.[22]

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[19] "The opposing party must file a brief within 30 days after the petitioner's brief is filed." Tex. R. App. P., Rule 70.2. Because the 30th day falls on Saturday, February 8, 2020, Respondent's brief must be filed on or before the "the end of the next day that is not a Saturday, Sunday, or legal holiday." Tex. R. App. P., Rule 4.1.

[20] Tex. R. Evid., Rule 508(c)(2)(A).

[21] *Sanchez v. State*, 98 S.W.3d 349, 355 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd). *See also, Thomas v. State*, 417 S.W.3d 89, 91 (Tex. App.—Amarillo 2013, no pet.), citing *Ford v. State*, 179 S.W.3d 203, 210 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd); *Gonzalez v. State*, 967 S.W.2d 503, 505 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd).

[22] *Thomas*; *see also, Anderson v. State*, 817 S.W.2d 69, 71 (Tex. Crim. App. 1991). *Brokenberry v. State*, 853 S.W.2d 145, 148 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd); *State v. Sotelo*, 164 S.W.3d 759, 761 (Tex. App.—Corpus Christi 2005, no pet.).

If the court finds

> that an informer may be able to give the testimony required to invoke this exception and the public entity claims the privilege, the court must give the public entity an opportunity to show *in camera* facts relevant to determining whether this exception is met.[23]

This opportunity must be made outside the presence of the parties and their counsel.[24]

If the informer's identity is not subject to the privilege, and the court orders disclosure, then if "the public entity elects not to disclose the informer's identity," the court must dismiss the case upon defendant's motion.[25]

As the Third Court held below, the trial court erred in ordering dismissal under Rule 508. Petitioner now asks this Court to reverse, arguing that the error found by the Third Court was waived by the State, or alternatively, that the trial court's findings are justified because the trial judge did not believe the officers when they said they could no longer identify the informant. Because Petitioner's allegations are either false or immaterial to this Court's analysis, neither ground has merit.

[23] Rule 508(c)(2)(C)(i).
[24] Rule 508(c)(2)(C)(ii).
[25] Rule 508(c)(2)(A)(i).

GROUND FOR REVIEW NUMBER ONE

THE THIRD COURT PROPERLY REVIEWED THE TRIAL COURT'S ERROR IN DISMISSING THE INDICTMENT BECAUSE: 1) NO OBJECTION TO THE TRIAL COURT'S ORDER WAS REQUIRED TO PRESERVE THE IMPROPER DISMISSAL FOR APPEAL, AND 2) THE STATE TIMELY, SPECIFICALLY AND REPEATEDLY OBJECTED TO THE TRIAL COURT'S ERRONEOUS FINDINGS AND ORDERS.

Petitioner's first issue claims that "the State never made a timely or specific objection to the trial court's finding that the informer could give testimony necessary to a fair determination of guilt or innocence."[26]

1. State's appeal under Tex. Code Crim. Proc. art. 44.01 does not require State to object.

The State's right to appeal an indictment's dismissal derives exclusively from art. 44.01, Texas Code of Criminal Procedure.[27] Art. 44.01(a) states "The state is entitled to appeal an order of a court in a criminal case if the order: (1) dismisses an indictment…."[28] The State is not required to object to a dismissal order to complain on appeal.[29] As the Third Court pointed out in its opinion, "[Petitioner] cites no authority indicating that the State was required to object to this specific finding apart from

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[26] Pet. Brief., at.15.

[27] *State v. Lohse*, 881 S.W.2d 171, 172 (Tex. App.—Houston [1st Dist.] 1994, no pet.), citing *State v. Garrett*, 798 S.W.2d 311, 313 (Tex. App.—Houston [1st Dist.] 1990), *aff'd*, 824 S.W.2d 181 (Tex. Crim. App.1992).

[28] *See* art. 44.01 (a)(1).

[29] *State v. Morales*, 804 S.W.2d 331, 333 (Tex. App.—Austin 1991, no pet.). *See also, Lohse*, at 171-72; *State v. Morales*, 804 S.W.2d 331, 333 (Tex. App.—Austin 1991, no pet.); *Garrett*, at 313.

appealing the trial court's dismissal order."[30] Petitioner's brief to this Court does not remedy this omission.

Petitioner cites to no cases interpreting art. 44.01 as requiring an objection to preserve the State's appeal. Indeed, Petitioner's brief is completely devoid of any mention of art. 44.01. Instead, Petitioner refers the Court only to Texas Rule of Appellate Procedure 33.1,[31] which provides the rule for preserving objections to evidentiary rulings, not court dismissals.[32]

Petitioner's "good for the goose/good for the gander" plea is inapt. He complains that "there is no question that Lerma would be barred from presenting [a trial court's finding against disclosure]" without an objection to the finding, but he cites to no authority for the proposition that such would be the case. Petitioner's premise is false: assuming the trial court had overruled Petitioner's timely filed motion for

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[30] *Lerma* at *9, n.5.

[31] Pet. Brief, at 17-18.

[32] *Lohse*, at 172, citing *Garrett*, at 313 ("The State need not comply with Tex. R. App. P. 52(a) [the predecessor to the current Rule 33.1], which applies to evidentiary rulings, to preserve its right to appeal a dismissal of an information."). *See also*, *State v. Ringer*, 05-16-00939-CR, 2017 WL 2927826, at *2 (Tex. App.—Dallas July 10, 2017, pet. ref'd)(not designated for publication), noting, "article 44.01(a) of the Texas Code of Criminal Procedure specifically authorizes the State to appeal an order of a court in a criminal case that 'dismisses an indictment,'" after pointing out that "Rule 33.1(c) specifically states that a party is not required to make a formal exception to a trial court's ruling to preserve error."

disclosure and that the motion had made clear why the disclosure was warranted, nothing more would have been required to preserve error under Rule 33.1.[33]

In addition, Petitioner's goose argument misses the point recognized by the Third Court in *State v. Morales*: "requiring an 'objection' to a ruling or order that disposes of the entire case would be tantamount to requiring a motion for new trial or other post-judgment motion, and such motions are not a prerequisite for appeal in criminal cases."[34] Requiring the State to object to a trial court's dismissal would be like requiring a defendant to object to his guilty verdict in order to preserve a sufficiency of the evidence complaint on appeal.

2. The State specifically and repeatedly objected to the trial court's finding

Although art. 44.01 does not require the State to object to preserve error, the record is replete with the State's objections to both the procedures and findings that led the trial court to erroneously dismiss the case. Petitioner's allegation to the contrary is false.

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[33] Petitioner could have waived error by failing to obtain a ruling or failing to object to the court's refusal to rule on the motion. Tex. R. App. P. 33.1(2)(B). But assuming a record like this one, altered only by the trial court's having denied Petitioner's request for disclosure, Petitioner's complaint would have been preserved.

[34] *State v. Morales*, 804 S.W.2d 331, 333 (Tex. App.—Austin 1991, no pet.)

a. Petitioner requests the trial court order disclosure of information protected by the informer privilege.

The State disclosed that a confidential informant had made a controlled buy of marihuana from Joel Espino ("Espino"), the deceased, about three months prior to the shooting.[35] Petitioner demanded to see the file on the controlled buy, speculating that the deceased could have been killed intentionally because the roommate might have found out that the deceased was working as a CI.[36] The prosecutor opposed disclosing the file, but indicated he would check to see whether Espino himself was ever developed as an informant.[37] The prosecutor later affirmed that Espino had not been worked as an informant, and the task force had undertaken no further investigation into his activities.[38]

b. The prosecution objected that Petitioner's request to require disclosure of the informant's identity was based on mere speculation.

At the next hearing, when Petitioner requested that the court order discovery relating to "if the CI, or if the deceased in this case was working as a result of this

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[35] *Lerma*, at *1. Petitioner's brief describes this three months as "close in time to the alleged offense." Pet. Brief, at 2.
[36] *Lerma*, at *1.
[37] 2 RR 19.
[38] 5 RR 8. Petitioner's claim that "the State made it abundantly clear in open court that the State did not know if there was any exculpatory or mitigating evidence contained within the HCNTF files regarding the controlled buy," (Pet. Brief, at 2) is misleading. When Petitioner first proposed that the deceased might have been an informant, the State indicated he did not know whether the task force had ever contacted Espino (2 RR 15). At no time did the prosecutor ever imply that exculpatory or mitigating evidence might have been withheld.

investigation,"[39] the State objected to Petitioner's demand for disclosure, reminding the court that to compel disclosure the Petitioner "has to show that [the information] would be material beyond merely speculating that it might exist."[40]

The trial court conceded the speculative nature of the theory offered to justify the disclosure.[41] The State then reminded the court that confidential informant information is privileged.[42] The trial court acknowledged the rule, but said,

> Well, it may be privileged, but I don't -- privileged be damn if it means that the defense lawyer can't get exculpatory evidence in a capital murder case.[43]

The State again pointed out that the defense was only speculating without proof of any such exculpatory evidence.[44] The court at first acceded to an *in camera* review of the information,[45] but then opined that the defense would be in a better position to know whether the information was of use, and then told Petitioner, "Prepare whatever order you need. You are going to get to look at it."[46]

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[39] 5 RR 6.
[40] 5 RR 7.
[41] 5 RR 7
[42] 5 RR 9. *See* Rule 508, Tex. R. Crim. Evid.; and Tex. Code Crim. Proc., art. 39.14(a)(providing for discovery to the defense of items in the State's possession that are "not otherwise privileged that constitute or contain evidence material to any matter involved in the action.") [Emphasis added.]
[43] 5 RR 9.
[44] 5 RR 9. The informant has never been demonstrated to have exculpatory testimony to offer.
[45] 5 RR 10.
[46] 5 RR 13.

c. The prosecution informed Petitioner that the evidence was insufficient to support a materiality finding under Rule 508.

The State reminded Petitioner on June 5, 2017, that Rule 508 required a materiality finding before the order would be proper, and that the State did not believe the exception to the informer's privilege had been met.[47] On June 16, 2017, the prosecutor again requested that Petitioner prepare an order demonstrating compliance with Rule 508. Although the court had indicated that the State should have input into the order's wording,[48] Petitioner refused to incorporate the required findings or an *in camera* hearing order to comply with Rule 508 prior to releasing the information.[49]

d. The State objected to Petitioner's proposed order requiring disclosure of the informant's identity without the findings required by Rule 508.

When Petitioner's non-compliant proposed order was presented at the next hearing on June 19, 2017, the State again objected, informing the court, "Rule 508 requires that the Court make a finding that the confidential informant can give testimony necessary for guilt or innocence."[50] Without answering the State's objections, Petitioner asked the court to sign his non-Rule 508-compliant order.

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[47] CR 10.
[48] 5 RR 13-14.
[49] CR 7-9. Petitioner concedes that he "intentionally did not include the language of TRE 508" in his proposed order. Pet. Brief at 26.
[50] 6 RR 5.

When the court signed Petitioner's deficient order, the prosecution again objected and the court noted the objection by challenging the prosecutor to appeal and ridiculing his ability to do so:

> [PROSECUTOR]: Note our exception, please, Your Honor.
> THE COURT: Except all you want, Counselor. You know where the appellate court is.
> [PROSECUTOR]: I do, Your Honor.
> THE COURT: Good luck finding it.[51]

e. The State's mandamus filings reiterated the prosecutions objections to both the trial court's failure to comply with Rule 508, and the lack of evidence to support the required findings.

The prosecution then initiated mandamus proceedings to require the court to comply with Rule 508's *in camera* hearing requirements.[52] The State's Petition for Writ of Mandamus and Motion For Temporary Relief, filed in the Third Court of Appeals, related the requirements of Rule 508, noting that the trial court had held no *in camera* hearing, and that

> [Petitioner]'s attorney provided no information that would lead a reasonable trial judge to conclude that the informant was present or had any material testimony to give in the capital murder case. Respondent's order relieved [Petitioner] from even attempting to meet the burden imposed by Rule 508.[53]

[51] 6 RR 5.
[52] *Lerma*, at *2.
[53] State's Petition for Writ of Mandamus and Motion for Temporary Relief, p. 14, *In re Wesley Mau*, 03-17-00424-CV (Tex. App. – Austin, filed June 23, 2017).

Both the court and Petitioner, as real party in interest, were aware of the objections raised in the mandamus petition. Petitioner filed a response in the mandamus case, in which he acknowledged understanding that the State was asking for the appellate court to enforce the strictures of Rule 508.[54] The trial court's Findings of Fact and Conclusions of Law, filed following the dismissal order, also acknowledge that the court understood the nature of the objections in the mandamus petition.[55]

The trial court's eventual understanding of Rule 508's strictures is further evidenced by the trial court's decision to hold the *in camera* hearing in July 2017.[56]

f. Prior to the *in camera* hearing, the prosecution noted that there had never been a showing that the informant's identity was disclosable under Rule 508.

On the day of the *in camera* hearing, before taking any testimony, the prosecutor explained that he had learned that NTF had failed to document the CI's identity when he ceased cooperating after the controlled buy and that the CI's name had been forgotten.[57] The prosecutor noted that some identifying information was available and

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[54] Response from Real Party in Interest, Reynaldo Lerma, at p.11, *In re Wesley Mau*, 03-17-00424-CV (Tex. App.—Austin, filed June 30, 2017).

[55] CRSupp, at 4.

[56] As noted in the court below, "[the Third Court] denied the petition." *Lerma* at *2. The Third Court's opinion did not address the merits of the State's petition, but said only, "On this record, including the absence of evidence to support the State's claim that the documents at issue actually contain privileged materials, we deny the petition for writ of mandamus." Memorandum Opinion, *In re Wesley Mau*, 03-17-00424-CV (Tex. App.—Austin, filed July 10, 2017). The State then filed a petition for writ of mandamus in the Texas Court of Criminal Appeals. *Lerma,* at *2.

[57] 7 RR 11.

the informer's identity could potentially be determined, but the prosecution posited, "[W]e will never have to disclose that identity because there has never been a showing that that confidential informant would have any evidence to give."[58] The prosecutor again reminded the court that "under 508 they do not have to give you any information about the identity of a confidential informant unless certain steps are taken and findings are made."[59]

The trial court, however, made clear that whatever the evidence presented at the *in camera* hearing, he was only going through the motions without regard for what the evidence might be. The court declared, "I will listen to your officer's fairy tale. I am going to tell you right now, *I am going to stay with my ruling* and whatever you got needs to be shown to [Petitioner's attorneys],"[60] and, "Whatever information that you got to identify the person you need to give it to them."[61]

During the *in camera* hearing,

> the officers merely affirmed that the hypothetical the trial court proposed, in which [the roommate] Alejandro intentionally killed Espino, was "possible." The officers did not testify that the hypothetical situation was very likely, more likely than not, or even reasonably probable. Nor did they testify that they

[58] 7 RR 21. The court and Petitioner cannot have misconstrued the State's position at that point, *i.e.*, that an order to disclose would not be justified.
[59] 7 RR 20-21.
[60] 7 RR 22.[Emphasis added].
[61] 7 RR 21. While the informer's name was no documented, the officers could recall some other information about the informer.

believed the hypothetical theory to be true or that they had any reason to believe that it was true.[62]

Following the *in camera* interviews, the trial judge announced that "a reasonable probability exists that the informant could give testimony," but he did not elaborate on what he believed the testimony would be, or how that testimony would be material to the indicted charges.[63]

g. After the *in camera* hearing, the prosecution objected to the trial court's finding at the first opportunity after learning that no evidence had been obtained to support the court's finding.

The first court appearance after the *in camera* hearing transcripts were prepared was December 4, 2017, when Petitioner's motion to dismiss was heard.[64] This was

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[62] *Lerma*, at *8. For example, the following exchange took place when the court questions Commander Wade Parham ("Parham") *in camera*:

> Q. [by the court] Okay. Well, the defense team in this case are concerned that somebody may have informed the roommate who shot Mr. Espino --
>
> A. [Parham] Espino, yes, sir.
>
> Q. -- twice, once in the head and once in the hip. Did -- and did shoot two other people too, but not fatally. Somebody may have told him about this controlled buy and he may have been very suspicious and paranoid about his roommate and may have used this particular affray as an opportunity to dispose of the problem.
>
> Do you see how that would be exculpatory?
>
> A. Yes, Your Honor.

7 RR 63. However, when translated to the court's findings of fact, this became, "Wade Parham testified that he understood how the identity of the CI could potentially be exculpatory in Mr. Lerma's case." CR Supp. 6; Pet. Brief, at 5.

[63] 7 RR 79. The trial judge informed the parties that the witnesses had testified *in camera* that they could no longer identify the informant, but that the informant had made a controlled buy at the decedent's house. 7 RR 77-78. These facts were already known to the defense, and did not relate to any proposed testimony by the informant relating to the murder three months later.

[64] 9 RR 1-28.

the State's first opportunity after the court's erroneous finding to make an objection.[65] Prior to this hearing, the prosecution could only have assumed that the court's finding was unjustified, because the evidence was taken *in camera*, and the substance of that evidence was unknown to the parties.

At this first opportunity, the prosecutor objected to the finding, stating,

> I still maintain that there has been no showing that this informant, to the extent that he may have information that would be of some potential use to the defense, that's conjecture. That's speculation.[66]

The trial court actually agreed with that assessment,[67] but refused to change his finding.[68]

h. The prosecution objected to the trial court's dismissal of the case prior to the court's ruling.

In that same hearing, the State argued strenuously and at length that not only did the evidence not support the trial court's finding, but that no legal or factual support existed for granting the motion to dismiss.[69] The prosecutor argued that no precedent justified dismissing a case "where the crime that's being prosecuted is not even directly related to the crime that the informant was involved in."[70] The trial court replied, "But

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[65] 9 RR 4-5.
[66] 9 RR 13. This statement was made during the hearing in which Petitioner now claims "the State still never made a sufficiently specific objection regarding the trial court's finding."
[67] The Third Court also concurred that "the record…contains no evidence indicating the materiality of the CI's identity." *Lerma,* at *9.
[68] 9 RR 13.
[69] 9 RR 12-19, 21-28.
[70] 9 RR 19.

it's the right thing to do. That's no reason for me not to do it," to which the State again objected, saying, "And I don't think it's the right thing to do, Judge."[71]

The prosecutor further argued that the law enforcement authorities had not "elected" to refuse to identify the informant, but that the informant's identifying information had been lost.[72] In addition, the State had provided to the court all the information then available to help identify the informant, *i.e.*, the informant's identity had been disclosed as much as then possible.[73]

i. The prosecution reiterated its objections in a trial brief requested by the court.

During the December 4 hearing, the trial judge took the motion to dismiss under advisement and requested briefs.[74] The State's filed trial brief set out the lack of evidence to support the finding that the informer was a material witness[75] and reiterated,

> To the extent the defense imagines that the CI might provide some other background information relating to the charges filed here, Texas appellate

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[71] 9 RR 19.

[72] The prosecutor argued that "An election implies an act by the person that is electing, making that conscious choice," (9 RR 23) as opposed to an inability to comply due to having lost the information. Rule 508 permits dismissal as a remedy on when, after finding "a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence," "the public entity *elects* not to disclose the informer's identity."

[73] 9 RR 23, 28.

[74] 9 RR 19, 20

[75] *See* CR 59-61 (setting out the lack of evidence to support the speculative theories proposed by Petitioner) and CR 65-71 (encompassing the State's argument sections titled "'The charges to which the [CI's] testimony would relate,' are not the subject of the indictment" and "The CI could not exonerate the Defendant.") These sections constitute the majority of the brief.

> courts have many times rejected arguments to disclosure [sic] the CI's identity in cases where the informant's proposed testimony has not been shown to bear directly on the accused's guilt.[76]

In addition, the brief reurged the State's argument that no "election" not to disclose had been shown by the evidence[77]

The trial brief concluded with a plea that the court deny the motion to dismiss.[78]

j. The State objected to the trial court's granting dismissal.

Finally, when the trial court granted Petitioner's dismissal motion on March 26, 2018, the State immediately informed the court of its intent to appeal. The entire hearing was as follows:

THE COURT:	15-0598, State versus Reynaldo Lerma.
[PET. COUNSEL]:	He's in custody. Counsel is present, judge. I'm just waiting on the ruling.
THE COURT:	Your motion is granted.

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[76] CR 65-66. The brief outlined numerous cases favoring this proposition, including: *Menefee v. State*, 928 S.W.2d 274 (Tex. App.—Tyler 1996, no pet.); *Baker v. State*, 03-99-00036-CR, 1999 WL 1072607 (Tex. App.—Austin Nov. 30, 1999, no pet.); *Bodin v. State*, 807 S.W.2d 313 (Tex. Crim. App. 1991); *Herrera v. State,* 03-04-00192-CR, 2006 WL 357874 (Tex. App.—Austin Feb. 16, 2006, no pet.); and *Quinonez-Saa v. State*, 860 S.W.2d 704 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd). CR 66-69. Petitioner's claim that "The State …did not cite a single case in its briefings to communicate to the trial court that the trial court had abused its discretion in making the initial finding," is manifestly false. None of the cases noted above related to the "election" issue.
The Fort Worth Court of Appeals has since reaffirmed that if "the informant was neither a participant in the offense for which the accused was charged nor present when a search warrant was executed or an arrest was made, then the identity of the informant need not be disclosed because the testimony is not essential to a fair determination of guilt or innocence." *Coleman v. State*, 577 S.W.3d 623, 636 (Tex. App.—Fort Worth 2019, no pet.).

[77] CR 62-65. This argument is presented in four pages of the 14-page brief.CR 62-65. Petitioner's claim that "all of the State's briefing before the trial court in the case at hand centered on the issue of whether or not an election was made by the State, not on the original finding" (Pet. Brief, at p. 22) is patently false. The majority of the brief concerns the complete lack of demonstrated materiality. *See* footnote 75.

[78] CR 71.

[PET. COUNSEL]: Thank you, Your Honor.
[PROSECUTOR]: Your Honor, in order to do an appeal, we would request to stay the proceedings until the appellate court can rule on this.
THE COURT: Do whatever you're big enough to do.[79]

3. Petitioner's contention that the State did not object to the court's materiality finding is contradicted by the entire record.

a. The prosecution objected at every possible opportunity

The record demonstrates the State's repeated objections that the evidence was insufficient to justify a Rule 508 materiality finding. Nonetheless, Petitioner declares, "The record is completely void of the State making any specific or timely objection to the finding, either orally or in writing, and actually reflects that the State was satisfied that the trial court conducted the hearing and made the finding."[80] To the contrary, the State at every juncture argued that the evidence was insufficient to support a materiality finding.

1) The State's first objection was well prior to the *in camera* hearing when the prosecutor argued that the informant's identity was privileged and that speculation alone did not justify disclosure.[81]

2) Just before the *in camera* hearing, the State clearly outlined,

[79] 12 RR 4.
[80] Pet. Brief at 16.
[81] 5 RR 6-9.

> My position is no evidence that is going to be presented to the court that will even suggest that this confidential informant has any relevant testimony to give in this case.[82]

3) After the hearing, as soon as the evidence was made known to the prosecution, the State again reiterated that the trial court's finding could not be supported by conjecture and speculation alone.[83]

b. The prosecution's recognizing that the court had reluctantly held the *in camera* hearing did not waive objection to the court's erroneous finding

Petitioner points to the prosecutor's statement "I am satisfied that the 508 hearing has taken place as the rule requires," as indicating the State was "content with the trial court's ruling."[84] This inference flies in the face of every statement the prosecutor made regarding that ruling.

It is true that the State "repeatedly and aggressively" urged the trial court to comply with Rule 508's *in camera* hearing requirement. The court's having finally acquiesced, the State was, "satisfied that the 508 hearing has taken place as the rule requires."[85] However, at no point did the prosecutor ever concede that the trial court's decision following the *in camera* hearing was justified by the evidence. To the

[82] 7 RR 36.
[83] 9 RR 13.
[84] Pet. Brief at 16.
[85] 7 RR 79.

contrary, the record is rife with the State's arguments to the contrary, both orally and in writing.

4. The State's objection to the trial court's findings and orders was timely and specific.

a. Although not required to do so pursuant to art. 44.01, the prosecution timely objected to the finding

Even though the State is not required to object, the State did everything possible to apprise the court of his error(s) and to inform Petitioner that he had not met his Rule 508 burden. Given the record, Petitioner's claim that neither he nor the trial court had any way of knowing that the State believed the finding to be objectionable (and why) is not only unfounded, it is absurd.

Error preservation issues are not considered in isolation, but within the context of the entire record.[86] The State objected 1) when the disclosure issue was first raised, arguing that no evidence justified disclosure, 2) prior to the *in camera* hearing, when the prosecutor told the court the evidence would be insufficient to justify the finding, and then 3) again after the finding was made and the State was provided with the evidence, arguing in court at the first opportunity and then in a written brief thereafter that the evidence did not support the finding and dismissal was inappropriate.[87]

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[86] *Douds v. State*, 472 S.W.3d 670, 674 (Tex. Crim. App. 2015).
[87] See above, beginning at p. 9

Petitioner wants this Court to limit its consideration only to the State's failure to object to the trial court's finding in the single moment immediately following the *in camera* hearing. At that time, the prosecutor had no way of knowing what evidence had been provided *in camera*, so no way of knowing whether that evidence supported the court's finding.

Petitioner suggests that the State desired the trial court's unsupported finding.[88] This claim is as ridiculous as the statement: "The defendant asked for a trial, so he must be happy with being found guilty." While the State did advise the court that a materiality finding must be made before ordering disclosure, the record does not support Petitioner's conclusion that the State agreed with the finding. When the court announced its finding, the State said, "That's, I think, all that the court is required to do," but immediately said, "Whether I think I -- whether I agree with that--" before being interrupted by the trial court's invitation to the defense to file a motion to dismiss.[89]

To demand that the State object to a finding or risk appellate waiver, without knowing whether the evidence supported the finding or not, is unreasonable. To suggest that the State was satisfied with the finding simply because the proper procedures had been followed is equally unreasonable, particularly when the next

[88] Pet. Brief, at 10.
[89] 7 RR 79.

words out of the prosecutor's mouth clearly indicated disagreement. The State's objection is timely when the State objects to the finding at the earliest opportunity after having access to the evidence and prior to the court's dismissal. The court's dismissal occurred after numerous timely objections and arguments entreating him not to err by doing so.

b. Both the trial court and Petitioner were aware of the complaint.

i. The trial court was aware of the State's objection

"[A]ll a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it."[90]

When the trial court first indicated that it was contemplating ordering disclosure of the confidential informant, the prosecutor raised the privilege, and informed the court and Petitioner as to the proper finding required before such disclosure could be ordered. Petitioner directly and explicitly opposed the State's request for the court to follow the Rule 508 procedures.[91] When the pending mandamus convinced the court to comply with Rule 508, the State told the court and the defense that the evidence would not be sufficient. After the evidence was known, the State again told the court

[90] *Douds v. State*, at 674, citing *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992)
[91] 6 RR 4-5.

and Petitioner that the evidence did not support a finding that the informant had useful testimony.[92]

The trial court conceded that the informant's materiality was only speculative.[93] The court, however, openly refused to apply the Rule 508 standards and require any materiality showing until the State filed the mandamus petition, at which point the trial court made (albeit without supporting evidence) the Rule 508 finding. After the court's finding, and the *in camera* evidence was made known to the parties, the prosecutor reiterated the State's persistent position that the informant's materiality was conjectural and speculative. The court replied:

> THE COURT: Well, *it is,* but it -- the bottom line is, it very well could have been exculpatory. I made that finding --
> [PROSECUTOR]: The finding was --
> THE COURT: -- and we'll never know because the -- somebody's either lying or didn't do their job.[94]

Petitioner's claim that the trial court was unaware of the State's objection is meritless. The trial court was well aware that the prosecution objected to the finding as speculative, but throughout the proceedings maintained the position that he had

[92] 9 RR 13.
[93] 5 RR 6: "[Prosecutor]: It's pure speculation, Your Honor. THE COURT: It is."
[94] 9 RR 13 [Emphasis added].

expressed early on: "[P]rivileged be damn if it means that the defense lawyer can't get exculpatory evidence." [95]

ii. Petitioner was aware of the State's objection

Petitioner's position that he "was never given the opportunity to respond to the State's objections regarding the trial court's finding,"[96] is also completely contrary to any reasonable reading of the record. There was no point in time when the State missed an opportunity to point out that mere speculation and conjecture were all the court had before it, and that such was insufficient to justify ordering disclosure of an informant's identity. When the prosecutor directly informed Petitioner's counsel that Rule 508 required more evidence than had been presented, Petitioner's counsel not only declined to recognize the requirements, but asked the trial judge to ignore them as well.[97]

At no point did Petitioner inform the court that he wished to offer more evidence.[98] When, following the *in camera* hearing, the State directly challenged the

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[95] 5 RR 9. Note that characterizing the informant's potential testimony as "exculpatory" rather than non-privileged is a distinction without a difference. If the informant's testimony was proved reasonably likely to be exculpatory it would necessarily then be material. However it may be labeled, the record contains no such evidence, as the Third Court noted. *Lerma*, at *9.

[96] Pet. Brief, at 20.

[97] CR10, 6 RR 5.

[98] And why wouldn't he, when the court had indicated so clearly that ignoring them was what he intended to do?

informer's connection to the case as too tangential and vague to satisfy Rule 508,[99] Petitioner replied:

> Judge, we're not talking about any tangential issues with this case. We're talking about a finding that you made…that a termination of reasonable probability exists that the informer can give testimony to a fair determination of guilt or innocence. We're not required to establish motive, nothing. We've simply complied with what the law asked for.[100]

Petitioner not only recognized that the State was objecting to the trial court's finding ("We're talking about a finding that you made"), but he also declared that he had complied with "what the law asked for." Petitioner was not deprived of the opportunity to bring evidence to demonstrate that the informer's connection to the case was more than tangential. He was content to rely on the trial court's having made the finding without such evidence.

5. Petitioner's Issue 1 should be overruled.

While not required to object to the dismissal in order to preserve the error, the State did object, continuously, specifically, and in a manner understood by both Petitioner and the trial court. The Third Court of Appeals did not err in reviewing the improper dismissal.

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[99] 9 RR 15.
[100] 9 RR 16.

GROUND FOR REVIEW NUMBER 2

THE THIRD COURT PROPERLY FOUND ERROR IN THE DISMISSAL OF THE INDICTMENT NOTWITHSTANDING THE TRIAL COURT'S INCREDULITY REGARDING THE WITNESSES' TESTIMONY ABOUT HAVING FAILED TO DOCUMENT THE CI'S IDENTITY, BECAUSE 1) KNOWLEDGE OF THE INFORMANT'S IDENTITY IS IRRELEVANT TO THE RULE 508 PREREQUISITES TO DISCLOSURE; AND 2) THE EVIDENCE DOES NOT SUPPORT THE TRIAL COURT'S FINDING.

In his second issue, Petitioner asserts that the trial court's finding that the NTF officers' testimony lacked credibility alone justifies the court's determination that the informer's identity should be disclosed.[101] But even if the NTF officers' *in camera* testimony had been false,[102] there is still no support for the trial court's finding that the informer's testimony would be "necessary to a fair determination of his guilt or innocence" so as to justify dismissing the case if his identity were not disclosed.

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[101] Petitioner's reasoning is encapsulated in the following passage:

> The trial court's finding constituted a legitimate exercise of discretion, as the logical inference made by the trial court was that if the State would go to such great lengths as to lie about their knowledge of the identity of the confidential informant, after aggressively invoking the 508 privilege, then the confidential informant must be able to provide testimony necessary to a fair determination of guilt or innocence.

Pet. Brief, at 28.

[102] In fact, it was anything but. When Petitioner directs this Court to the trial court's requesting an investigation into the NTF as evidence supporting the court's opinion, he omits that the investigation was—in the trial court's words—"inconclusive." Pet. Brief, at 31; 11 RR 4.

1. Petitioner cannot establish the Rule 508 materiality requirement by showing that the informant's identity is known.

As the Third Court noted,

> Even if we defer to the trial court's finding that the Task Force officers who testified at the hearing were untruthful, we cannot conclude, based on the record before us, that [Petitioner] met his initial burden of showing that a reasonable probability exists that the informer could give testimony necessary to a fair determination of his guilt or innocence.[103]

Petitioner's claim that the Third Court never considered the trial court's credibility concerns[104] is untrue, as illustrated by this passage. The Third Court noted the trial court's findings at length,[105] but correctly found its credibility determination to have little bearing.

A defendant cannot breach the informer's privilege merely by demonstrating that the police know who the informant is (or are lying about not knowing the informant's identity). Knowing an informant's name is not a prerequisite to establishing that the informant's testimony would be necessary. The State is not arguing that the court erred in ordering disclosure because the informant's name was

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[103] *Lerma*, at *8.

[104] Pet. Brief, at 29-30("[T]he Third Court of Appeals' opinion never once addresses the fact that…the trial court firmly believed that the State's witnesses were being dishonest that the State did not know the identity of the informant."); Pet. Brief, at 31-32 ("[T]he Third Court [ruled] without ever once considering that at the time of the finding, the trial court believed that the State provided the trial court with untruthful testimony.")

[105] *Lerma*, at **5-7.

unknown; the court erred because there was no evidence demonstrating the materiality of the informant's testimony.

Before a trial court is authorized to breach the informer's Rule 508 privilege, the informant's potential testimony must be shown to aid significantly the defendant, and the defendant must make that showing with evidence, not mere conjecture or speculation about possible relevancy.[106] On the other hand, when the prosecution claims the privilege and the defendant presents no evidence, "there [is] nothing for the court to consider," and no further hearing is justified.[107]

Although the trial court did not believe that the NTF officers' did not know the informant's identity,[108] the findings and conclusions mention no evidence the court *did* find credible from which one could infer that the informer could testify to a material fact. None of the *in camera* testimony established any connection between the informant and the offense, and Petitioner offered no other evidence to refute the officers' testimony or support any alternative fact-findings.[109]

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[106] *Brokenberry v. State*, 853 S.W.2d 145, 148 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd); *State v. Sotelo*, 164 S.W.3d 759, 761 (Tex. App.—Corpus Christi 2005, no pet.).

[107] *Smith v. State*, 781 S.W.2d 418, 421 (Tex. App.—Houston [1st Dist.] 1989, no pet.).

[108] CR Supp. 7.

[109] In *Baker v. State*, 03-99-00036-CR, 1999 WL 1072607, at *2 (Tex. App.—Austin Nov. 30, 1999, no pet.), the defendant offered no evidence to refute testimony establishing that the informant was not present during the search that resulted in the indictment, and that another man found inside the house during the search was not the informant. Although Baker argued on appeal that the informant should be disclosed because Baker might have been set up by the informant, the Court found "Baker failed to introduce any evidence or otherwise make any showing supporting this theory." *Id.,* at *4. The argument was therefore dismissed.

The United States Supreme Court has found that a defendant should be required to make that demonstration before a court can require disclosure of an informant's identity, even when the exact testimony the informer might give is unknown.

> [W]hile a defendant who has not had an opportunity to interview a witness may face a difficult task in making a showing of materiality, the task is not an impossible one. In such circumstances it is of course not possible to make any avowal of how a witness may testify. But the events to which a witness might testify, and the relevance of those events to the crime charged, may well demonstrate either the presence or absence of the required materiality.[110]

Petitioner expends much of his brief attempting to distinguish *State v. Sotelo*,[111] from this case.[112] In *Sotelo*, the defendant "asserted disclosure was required because the informant participated in the alleged offense, [and] was present both at the time of the alleged offense and at the time of [the defendant]'s arrest," but the offered evidence established only that the informant had provided past reliable information and was not present during the offense.[113] The trial court abused its discretion in ordering disclosure

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[110] *United States v. Valenzuela-Bernal*, 458 U.S. 858, 871, 102 S. Ct. 3440, 3448, 73 L. Ed. 2d 1193 (1982); *see, e.g., Sanchez v. State*, 98 S.W.3d 349, 356 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd). (informant who was eyewitness to indicted drug possession offense); *Mendoza v. State*, 823 S.W.2d 752, 754 (Tex. App.—Dallas 1992), supplemented, 830 S.W.2d 181 (Tex. App.—Dallas 1992, pet. ref'd). *See also, Williams v. State*, 62 S.W.3d 800, 802 (Tex. App.—San Antonio 2001, no pet.)(Investigator testimony that he "had no knowledge of whether the informant could give testimony regarding the guilt or innocence of the suspects," "showed nothing more than speculation as to whether the confidential informant's testimony could significantly aid the defense."

[111] *State v. Sotelo*, 164 S.W.3d 759, 761 (Tex. App.—Corpus Christi 2005, no pet.)

[112] Petitioner perceives that the Third Court's opinion "relies heavily" on the *Sotelo* case, although the *Lerma* opinion only cites the case twice, once noting the standard of review, (*Lerma* at *8) and again for support of the following proposition: "Because the record before us contains no evidence indicating the materiality of the CI's identity, we conclude that the trial court abused its discretion in granting [Petitioner]'s motion to dismiss." *Lerma* at *9.

[113] *Sotelo*, at 761.

of the informant's identity, even though the testifying narcotics agent related that the informant had seen cocaine at the defendants' residence within the previous forty-eight hours to the search that led to their arrests, and the informant claimed to know that the defendants were in the business of selling narcotics.[114] The court noted,

> Evidence established that the informant was not present at the scene at the time of the search, seizure, and arrest leading to the indictment.
>
> On this record, we conclude that the trial court's ordering disclosure of the informant's identity was outside the zone of reasonable disagreement and, thus, constituted an abuse of discretion.[115]

Petitioner asserts *Sotelo* is distinguishable because "the trial court in *Sotelo* never actually formally made the finding that a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence, unlike [Petitioner]'s case, where the trial court actually made the proper finding."[116] But whether a finding is stated on the record or implied makes no difference if it supports the trial court's decision—findings that support a trial court's ruling are implied if the evidence, viewed in a light most favorable to the ruling, supports those findings.[117] The Thirteen Court of Appeals did not reverse the trial court because it failed to make the finding; the trial court was reversed because "*the evidence does not*

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[114] *Id.,* at 761–62.
[115] *Id.*, at 762–63.
[116] Pet. Brief, at 33.
[117] *See State v. Kelly*, 204 S.W.3d 808, 818–19 (Tex. Crim. App. 2006)

show that the informant may have been able to give testimony necessary to a fair determination of the issues of guilt or innocence."[118]

Here, the informant's connection to the offense charged is nebulous, at best, and far weaker than the apparent link between the *Sotelo* informant and the offense charged in that case. Here, no evidence justified a conclusion—explicit or implied—that this informant had any testimony relevant to guilt or innocence to offer.[119]

2. The trial court's findings establish no connection between the informer's testimony and Petitioner's charges

Even if the evidence supported a finding that the NTF "elect[ed] not to disclose the informer's identity,"[120] Rule 508 authorizes the court to dismiss only "the charges to which the testimony would relate."[121] However, in finding that "a reasonable probability exists that the informant could give testimony if we knew who he was,"[122] the trial court made no finding as to what relation that testimony could have to Petitioner's capital murder indictment.

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[118] *Sotelo,* at 762.

[119] *See also*, *Olivarez v. State*, 171 S.W.3d 283, 293 (Tex. App.—Houston [14th Dist.] 2005, no pet)(Defendant's showing that informant who provided information leading to search warrant might have information about the house and could testify that the defendant had no ownership or control over it, "is insufficient to merit an *in camera* hearing, much less require the trial court to order disclosure of the informant's identity," when informant was not present at the arrest.)

[120] Tex. R. Evid, Rule 508(c)(2)(A).

[121] Rule 508(c)(2)(A)(i).

[122] 7 RR 79.

At most, the evidence supports a finding that the informant would be able to testify about the circumstances of the controlled buy three months prior to Petitioner's offense. Beyond those circumstances, the possible value of informant's testimony to Petitioner is speculative, as the trial court conceded.

If this case involved a delivery of marijuana indictment charging Petitioner with selling to the informant, then the defense would certainly have a right to have the informant named as a witness to the offense and to have the prosecution dismissed if the NTF chose to protect the informant's identity. Petitioner's charges, however, do not relate to the controlled buy in March, and neither the trial court's fact findings nor his distrust of the NTF officer testimony support a dismissal under Rule 508.[123]

3. The Third Court of Appeals was not bound by the trial court's findings, which are unsupported by the record.

While the court's credibility determinations are normally given almost total deference, appellate courts need not accept findings that are not supported by the record when viewed in a light most favorable to the trial court's ruling.[124] The court's findings here are unreasonable in several instances.

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[123] Any testimony regarding the controlled buy would be inadmissible (as irrelevant) in the absence of evidence (not mere conjecture) establishing said testimony to have a tendency to make a relevant fact more or less probable than it would be without the evidence. *See* Tex. R. Evid., Rule 401.

[124] *Tucker v. State*, 369 S.W.3d 179, 187 (Tex. Crim. App. 2012). *See, e.g., Miller v. State,* 393 S.W.3d 255, 264 (Tex. Crim. App. 2012)(deference denied to finding that apartment was in "disarray, consistent with an altercation," despite disarray being consistent with violence, because defendant denied violence and no other evidence was found to corroborate violent incident.)

For example, Petitioner's brief claims the trial court's credibility finding is "confirmed" by "the email correspondence between the Commander of the HCNTF and the State."[125] The court made a finding that "Wade Parham did not disclose to the court during the hearing that he had communicated with the District Attorney in writing on August 19, 2016, *that he knew the identity of the informant*."[126] There is no evidence of any such communication. Rather, the court inferred that Parham knew the identity from Exhibit 1 of *Defendant's First Amended Motion to Dismiss Pursuant to TRE 508*.[127] In that written communication to the District Attorney, Parham noted "I'm not going to reveal which informant made the purchase from Espino," and said "It wasn't anyone involved in the homicide." He did not tell the District Attorney that he knew the informant's identity.

The court inferred that the email "indicates that [Parham] must have reviewed some file or some information."[128] Whether or not that inference is reasonable, the court made no finding that the informer's identity was, in fact, known to the NTF on

[125] Pet. Brief, at 32; CR Supp. 7.
[126] CR Supp. 6 (emphasis added).
[127] CR 57.
[128] CR Supp. 8.

or after the date of the court's determination that the informant could provide relevant testimony.[129]

In his Conclusions of Law, the trial court finds that

> There is an email correspondence addressed to the District Attorney from Wade Parham, dated August 19, 2016 that shows that Parham has elected not to not disclose the informer's identity as ordered by the court.[130]

Even if the referenced email supports the assertion that Parham opposed revealing the identity *at the time he wrote the email*, no such court order existed until June 6, 2017, almost a year later. At the hearing prior to the email, Petitioner had stated,

> We believe that Mr. Espino was acting as a CI for the task force during this time period. I believe that there will be information that they have in their files showing that. We want to know if they have any reports, recordings, interviews with Mr. Espino specifically regarding his relationship after he was arrested in TF15-033-1[131] and what resulted in that charge not being prosecuted and the evidence being destroyed. We believe he [Espino] was acting as a CI and we would like to have any information that pertains to that.[132]

The only "order" for discovery that Parham's email could refer to was what was relayed to Parham by the prosecutor after Petitioner's statement above, requesting only:

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[129] Parham's statement—when read together with his later testimony—is more easily understood as responding only to the question of whether or not the victim was an NTF informant, adding as an afterthought that he would oppose revealing the identity of the informant if asked. The email is no evidence that he had inspected the files to see if the information was there, or what it was, because those questions had not, at that point, been asked.

[130] CR Supp. 7.

[131] TF15-033-1 is the case number assigned to the controlled buy three months before the capital murder.

[132] 2 RR 14-15.

> 1) any reports, recorded statements, or other documentation relating to whether Joel Espino was working as a CI or had participated in a controlled buy for the HCNTF,
> 2) the written reports in TF15-033-1, including any documentation relating to "the destruction of evidence occurring on or about April 22, 2015 in HCVTF Cause No. TF15-033-1."
> 3) All reports, incidents reports, notes, or other documentation from the Hays County Narcotics Task Force relating to 1701 River Road #15, San Marcos, Texas.[133]

Parham's reply was, "*in case he asks*, I'm not going to reveal which informant made the purchase from Espino."[134] It is unreasonable to conclude that Parham was "electing" "not to disclose the informer's identity as ordered by the Court" when 1) no such court order existed at the time; 2) the "order" referenced does not require that the informer's identity be disclosed; and 3) Parham's reply clearly expresses his understanding that the defense had not yet asked for that information. The email correspondence cannot support the trial court's explicit finding that the email "shows that Parham has elected not to disclose the informer's identity as ordered by the court."

The trial court goes on to infer that Parham "must have reviewed some file or some information before sending the email to the District Attorney" because the court states that "[Appellee's] case is not one of Commander Parham's cases, and not a case that he had familiarity with at the date of the email." This finding is also contrary to the record. While Parham was never asked by the court what his role in the

[133] CR 57.
[134] CR 57 (emphasis added.)

investigation was,[135] he testified in the *in camera* hearing that he was familiar with Petitioner's case.[136]

The court also found that "The State's inconsistent position of protecting a privileged CI, and then claiming to not know the identity of the CI casts doubt on the reliability and credibility of the States' witnesses."[137] This finding implies the privilege is unavailable to protect informers' identities when those identities are undocumented, namely, if the State does know the informant's identity, then the privilege cannot be claimed. But nothing in Rule 508 limits the privilege to documented informers. There is nothing inconsistent in demanding the court follow the rules prior to requiring the State to disclose an informer's identity, regardless of whether the identity will be readily accessible. Even if there were some inconsistency between insisting on following the Rule 508 strictures and the possessing documentation of an informant's identity, this inconsistency would not obviate Petitioner's Rule 508 burden to show an informant's identity is material to his guilt or innocence for the charged offense.

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[135] Before the *in camera* hearing, the trial court was informed that "the narcotics people" were summoned to the murder scene because of the marijuana found at the house. 7 RR 11.
[136] 7 RR 63.
[137] CR Supp. 7.

4. Petitioner's Issue Two should be overruled.

Petitioner's Issue 2 asserts that the witnesses being untruthful "bolsters the rationality of the trial court's finding…that the confidential informant could provide testimony necessary to a fair determination of guilt or innocence consistent with [Petitioner]'s theory."[138] Even if the witnesses knew the informer's identity and desired to defy the court's order, the Petitioner would still have the burden of showing the informant's identity was material to the Petitioner's guilt or innocence. The trial court's belief the NTF witnesses are lying does not equate to the Petitioner having met his materiality burden. The Court of Appeals did not decide that the trial court erred in making its credibility determination, the Court of Appeals properly determined that the trial court's credibility determination was immaterial to whether the evidence presented was sufficient to satisfy Petitioner's burden under Rule 508.

Petitioner's second ground is also meritless.

CONCLUSION

Although the State was not required to object to the Court's dismissal pursuant to art. 44.01, the State objected at every possible stage leading to the trial court's decision. Those objections made clear to the court and Petitioner the same grounds found by the Third Court to justify reversing the trial court's decision. Petitioner has

[138] Pet. Brief, at 28.

failed to demonstrate that the State waived review of the trial court's erroneous dismissal order. Ground of Error One should be overruled.

Ground of Error Two should also be overruled because the trial court's credibility determination cannot cure the lack of evidence establishing the necessary facts to justify the court's action. While the trial court may have believed the NTF officers did know the CI's identity, that fact does not alone establish that the CI's testimony would be material under Rule 508.

PRAYER FOR RELIEF

Respondent prays this Court affirm the ruling of the Third Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TEX. R. APP. P., RULE 9.4[139]

I certify that this brief contains 9,918 words, exclusive of the caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of

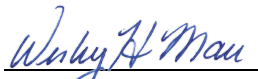
[139] A brief on the merits in a case under discretionary review must comply with the requirements of Rule 9. Tex. R. App. P. 70.3.

authorities, statement of the case, statement regarding oral argument, signature, proof of service, certificate of service, and certificate of compliance (but inclusive of footnotes), as indicated by the word count of the computer program used to prepare the document.

Wesley H. Mau
Criminal District Attorney

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing brief has been email-delivered via efile to counsel for Petitioner and the State Prosecuting Attorney on this the 6th day of February, 2020.



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